liams, petitioner, versus the State of Florida, U.S. Supreme Court, October Term, 1969, decided June 22nd, 1970, and in that case—

THE COURT: What's the citation?

MR. MEYER: It's in the Criminal Law Reporter dated 6-24-70, page 3160, and I have the copy from the Judges' library, and I can provide the Court with that.

THE COURT: Three what—?

MR. MEYER: 3160.

THE COURT: All right.

MR. MEYER: And in that case the court took the Florida Alibi Statute and upheld it in this case, but they went on to say that Florida had barely—had practically the same pretrial discovery available to the defendant as under the Federal Rules of Criminal Procedure, and the case—as I read it—went on to say that this was a distinguishing situation so that we would have to—where notice of alibi it wasn't really too much to ask of the defendant, considering the fact that the defendant have [sic] broad discoveries available to him such as in the Federal courts where we have prior to trial the pre-trial conference where everything is furnished and provided practically—well, a summary of what each witness's testimony will be and a list of the witnesses and for that persuasive value it might have.

Several weeks ago this came up again—this came up in the Circuit Court here with Judge Perry, and Judge Perry allowed the alibi testimony in based upon this case and said that he at that time, based on our statute and based on this opinion, that he didn't feel that our criminal code and our statute should allow a substantive evidence that the defendant might have to be kept out due to this, and that is the reason that notice was not given. I relied somewhat upon that and my own interpretation of this case also.

THE COURT: All right. What is the citation of the Alibi Statute?

MR. MEYER: I am trying to find it here, Your Honor. I have to look it up. I can't find it.

THE COURT: It probably would be easier to find it under the Session Laws.

MR. MEYER: Yes. I know it's in the Digest of the Session Laws, the little pamphlet.

THE COURT: It should be in these codes too.

(To the Bailiff) Would you get me out of my chambers 1969 Session Laws.

MR. MEYER: It appears, Your Honor, that the replacement parts are not in these volumes. I think that's our problem.

THE COURT: It's Chapter 2, 93 Oregon Laws of '69, provides that if the defendant in a criminal action proposes to rely in any way on alibi evidence he shall, not less than 5 days before the trial of the cause, file and serve upon the District Attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense, together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to fail and serve such notice he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good reason orders otherwise. As used in this section alibi evidence means evidence that the defendant in a criminal action was at the time of the commission of the alleged offense at a place other than the place where such offense was committed.

Now you simply say that is not a constitutional statute?

MR. MEYER: Yes, based on the U.S. Supreme Court opinion and that was my reaction, and I raised this in trial just two weeks ago, State v. Perez, and the State made the same objection, and the Court took it under consideration and agreed that our criminal code as it's matched up against Florida's and set with this opinion was such that it would not be constitutional.

THE COURT: Now, it will be the ruling of the Court that the objections be sustained.

You may want to make any kind of a showing as to why the Court should, for some good reason, allow you to offer the evidence.

MR. MEYER: Yes. I can represent to the Court that the reason that I did not follow the statute was because of Judge Perry's ruling previously, and I would be willing to so testify.

THE COURT: All right. I take that to mean that by past statute, not because of any ignorance of what the State is claiming, at the time and place of the alleged offense.

MR. MEYER: Well, we were, until yesterday, under the impression there was a motion to suppress—let me back up a little. There was a motion to suppress in a companion case; at that time it was our recollection that a witness had testified that this had happened on the 22nd. We obtained a transcript of that—well, this morning. But we asked that a tape be read back to us, I think two days ago—that would have been Monday. On that day it was said to be—that the transcript read that it was the 21st. At that time we sought this witness. We were under a different impression as to what had taken place. So I did not meet this girl until today and did not know her name until just before I called her, and the defendant sought her out and was to bring her in yesterday so I could see what her testimony would be, and I did not meet her till today. So that would be one reason that we thought we had a different day.

THE COURT: The date alleged is the 21st and—

MR. MEYER: Yes, and we thought the witness had testified the 22nd, which would have been after the crime, and that was primarily what our defense was at that time. But I had also thought of calling some alibi witnesses regarding the 22nd, which was after the crime and after the date alleged in the indictment because our recognition of the date Officer Harp testified to before was different. So we had not relied on this witness until—well, Monday when we saw what that transcript said.

THE COURT: When was the motion to suppress heard?

MR. MEYER: August 4th, and at that time I was not—during that motion to suppress we were not concerned with this date; we were concerned with a later time, and I didn't take the notes. I asked Harp—the witness Harp if he had ever seen the defendant before

at the motion to suppress and that's when the date came out, and I was not concentrating on that because I was concentrating on something else during the motion to suppress, and it was Mr. Wardius's recollection that it was the 22nd. He was absolutely sure that's what he said, and when we checked the transcript so that we could confront the witness Harp with the date, unfortunately, it said the 21st, and so what Mr. Wardius's recollection of it was incorrect. So once we realized that then he recalled that he had dated this girl this evening and I said, "Go get her".

THE COURT: All right. What's the State's position now?

MR. HORTON: Well, the State's position is this, Your Honor—are you talking about in regard to the showing of circumstances which would allow the Court for this witness to testify?

THE COURT: Yes.

MR. HORTON: All right. No. 1, the motion to suppress was held over a month ago; counsel was present at that motion to suppress; there was a Court Reporter present; he had an opportunity to examine the recording of that proceeding to determine the date in question on which the defendant and the witness confronted each other; the indictment clearly states the date of the 21st; an error on his behalf, taking notes, and no further checking on that until a short time prior to the proceedings today should not be the type of situation as defined by statute which would allow the Court to permit such testimony. He did, by his own testimony to the Court, anticipate calling alibi witnesses regardless.

There, of course, was no information given the State prior to day [sic] for those witnesses either. We don't feel he has shown sufficiently for the Court's consideration a reason why this testimony should be allowed.

THE COURT: All right. Now, Mr. Meyer, no matter what day you had an impression about, you didn't give notice that that day either.

MR. MEYER: That is correct, but for the reason that it was after the date alleged in the indictment. If it was after the the [sic] date the indictment alleged it would

be a little different type or offense. It's the 21st in the indictment and it was our recollection that it was the 22nd, and so we were—my own thinking was that if he had a date after the occurrence, that we were in a slightly different position and maybe I misunderstood the law on that issue.

THE COURT: The indictment was filed on the 22nd day of May and if he undertook to prove that this occurred sometime presumably later in the day, after the closing of the courthouse on the 22nd, that it would be—

MR. MEYER: The indictment would have been returned prior to the commission of the crime.

THE COURT: The objection—I guess it's in the form of a motion to strike?

MR. HORTON: That's correct.

THE COURT: The motion to strike is allowed.

You want to make an offer of proof?

MR. MEYER: Yes.

THE COURT: All right. You tell me when you are finished with your offer of proof. You want to call several witnesses in support of your offer of proof, or is this the only witness?

MR. MEYER: I think I would like to—well, it won't be necessary. I will end my direct examination and depending upon what the State—

THE COURT: All right. You just tell me when you are finished. Go ahead.

MR. MEYER: No further questions of this witness. Okay, now, can this witness's testimony that she has previously given be taken as the offer of proof?

THE COURT: All right, if that's what you want.

MR MEYER: Yes.

THE COURT: All right. The offer of proof is rejected. You can call your next witness. Tha's [sic] all, Ma'am.

(Tr 29-39)

"* * * * *

[MR. MEYER] Q Where were you on May 21st, at 9:05 in the evening?

[MR. WARDIUS] A I was at the Eugene Drive-In.

Q And who was there with you?
A Colleen McFadden.
MR. HORTON: I am going to object, Your Honor, and ask that both these statements and answers be stricken from the record.
THE COURT: Do you wish to be heard?
MR. MEYER: Well, if I were to follow the—of course, I have my same opinion as prior regarding the alibi statute.
THE COURT: Yes.
MR. MEYER: But in this situation I would be required to give the State five days' notice that the defendant was going to testify and I don't think I am required to do that. The situation as to whether or not the defendant will testify, of course, is entirely up to us and I may not give the State any indication as to what my defense would be as pertaining to defendant's testimony.
THE COURT: I think the statute does contemplate all of the evidence offered by the defendant by its language. It covers the evidence that is now being offered, and it will be the order of the Court that the motion to strike—that was the form of your—
MR. HORTON: That's correct.
THE COURT: —will be allowed.
MR. MEYER: And what was stricken? The last two questions about the drive-in?
THE COURT: Yes.
Q (By Mr. Meyer) Did you ever—that all.

(Tr 40-42)

* * * *

VERDICT OF THE COURT—Filed September 16, 1970

[Caption Omitted in Printing]

This matter having come on before the court, and it appearing that the defendant, Ronald Dale Wardius, at the commencement of the trial, duly waived the trial of this matter to the jury and left the trial thereof to the court, and the court having heard the testimony and examined the exhibits, is of the opinion and finds that the defendant, Ronald Dale Wardius, is guilty of the crime

of "ILLEGAL SALE OF NARCOTICS" as charged in the Indictment.

Dated this 16th day of September, 1970.

/s/ EDWARD LEAVY
Circuit Judge

* * * *

SENTENCE—Filed November 23, 1970

[Caption Omitted in Printing]

Now at this time this cause came on to be heard, the State of Oregon appearing by John B. Leahy, District Attorney for Lane County, Oregon, and the defendant, Ronald Dale Wardius, appearing in person and being represented by his attorney, John Meyer, said defendant having been duly tried and convicted of the crime of "ILLEGAL SALE OF NARCOTICS" before the court in the above entitled court and cause, and this being the time fixed for imposing sentence herein, and the court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED that said defendant, Ronald Dale Wardius, be and he hereby is sentenced to imprisonment for a term not to exceed eighteen (18) months and he is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon,

IT IS FURTHER ORDERED that the Sheriff of Lane County, Oregon deliver said defendant to the custody of the Warden of the Oregon State Penitentiary.

IT IS FURTHER ORDERED that the State have and recover judgment against the defendant for its costs and disbursements incurred herein, to be taxed, to be paid in the first instance to Lane County, Oregon.

Dated this 23rd day of November, 1970.

/s/ EDWARD LEAVY
Circuit Judge

* * * *

NOTICE OF APPEAL—Filed November 23, 1970

[Caption Omitted in Printing]

COMES NOW Defendant, Ronald Dale Wardius, by and through his attorney, John G. Meyer, and does hereby give notice to the State of Oregon, Plaintiff, and John B. Leahy, District Attorney for Lane County, Oregon, attorney for Plaintiff, that Defendant, Ronald Dale Wardius, does hereby appeal to the Court of Appeals of the State of Oregon from that certain judgment of conviction entered herein on the 23rd day of November, 1970. Defendant does appeal from the whole of said judgment of conviction.

DATED this 23rd day of November, 1970.

/s/ JOHN G. MEYER
Attorney at Law

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Department 2

STATE OF OREGON, RESPONDENT

v.

RONALD DALE WARDIUS, APPELLANT

OPINION—Filed August 26, 1971

FORT, J.

Defendant was convicted by the court sitting without a jury of the unlawful sale of narcotics. ORS 474.020. On appeal he challenges both the constitutionality and the application here of the alibi-notice statute (ORS 135.875), which reads as follows:

> "(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file

and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

At trial the defendant called as his witness one Colleen McFadden. The substance of her testimony was that on the night of the alleged sale the defendant had taken her to a movie. The court sustained a motion to strike that testimony on the ground that defendant had not filed notice of intent to rely upon an alibi as required by ORS 135.875.

Subsequently, the defendant took the stand and testified that on the night of the alleged sale, May 21, 1970, he had taken Colleen McFadden to a drive-in movie. The court again sustained a motion to strike defendant's testimony on the same ground.

The indictment here alleged the date of the crime as "on or about the 21st day of May, 1970." Counsel for defendant, in an effort to establish "good cause" why the notice required under ORS 135.875 was not given, stated the defendant erroneously recalled the state's undercover agent as testifying in a companion case tried about a month earlier that [sic] the sale took place on May 22. It was not until a day or two before the trial that defendant's counsel, who had also participated in the earlier trial, checked the transcript in the companion case and learned the witness actually testified May 21 was the date of the crime. No effort was made then to comply

with the statute or to seek a postponement of trial based thereon.

The court ruled that good cause for the failure to give the required notice was not shown, and adhered to its ruling striking the alibi evidence of both McFadden and the defendant. We think the court did not abuse its discretion in holding that "good cause" within the statute was not shown for failure to give the notice required by the statute.

Defendant asserts error in striking the proffered testimony on the ground the statute:

1) Compels him to be a witness against himself.
2) Deprives him of the right to confrontation because it does not guarantee him reciprocal discovery rights;
3) Abridges his right to testify in his own behalf; and
4) Denies him the effective benefit of his right to compulsory process to obtain witnesses in his own behalf.

We will consider these contentions in order.

Williams v. Florida, 399 US 78, 90 S Ct 1893, 90 S Ct 1914, 26 L Ed2d 446 (1970), disposes of the first point adversely to the defendant. In that case, the defendant's specific contention was that he was compelled to be a witness against himself contrary to the commands of the Fifth and Fourteenth Amendments. The court held:

> "* * * We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." 399 US at 83.

See also, Annotation, 30 ALR2d 480 (1953). *Accord:* Rider v. Crouse, 357 F2d 317 (10th Cir 1966); State ex rel Simons v. Burke, 41 Wis 2d 129, 163 NW2d 177 (1968); People v. Williams, 11 Mich App 62, 160 NW2d 599 (1968).

In Williams v. Florida, supra, the court stated:

> "We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair

trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States.[11] * * *

"[11] * * *

"We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; *that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.*" (Emphasis supplied.) 399 US at 81-82.

It is not however, necessary for us to decide that question. No witness was here called nor evidence offered by the state relating to the question of alibi. Thus, no prejudice is shown, and indeed, the defendant, on this latter score, claims none. Rider v. Crouse, supra.

Thus, we do not find it necessary to decide whether under ORS 135.875 the defendant is entitled to reciprocal discovery rights from the state, as authorized by Florida Rule of Criminal Procedure 1.200.[1] There has been no

[1] Florida Rule of Criminal Procedure 1.200 provides:

"Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may di-

denial thereof here. We, too, deem it appropriate, in the language of Williams v. Florida, supra, to "await a specific context" in which that issue is necessary to a decision.

Defendant next contends that since he is guaranteed the right to take the stand in his own behalf by our constitution (Oregon Constitution, Art I, § 11), he has an absolute right to do so and, in so doing, to testify himself, as well, concerning alibi as well as any other relevant matter.

Defendant confuses the right to testify with the requirement that he first comply with the notice requirement of the statute. It has been consistently held that a defendant urging insanity as a defense can, as in Oregon, be required to give notice thereof in his plea. ORS 135.870. State v. Wallace, 170 Or 60, 131 P2d 222 (1942). The legislature, by the enactment of Oregon Laws 1969, Ch 293, p 500, now ORS 135.875, saw fit only

---

rect, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proses to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule." Williams v. Florida, supra 399 US at 104, 105.

to require a defendant to give at least five days' notice of intent "to rely in any way on alibi evidence." The law does not deprive the defendant of his right to take the stand.

The Wisconsin Supreme Court recently considered this claim under a similar statute, and said:

> "* * * Assuming the right of a defendant under either or both state and federal constitutions to testify as a witness in his own behalf, it does not follow that such right outlaws any and all procedural requirements of conditions as to notice.
>
> "When any witness takes the stand, he swears or affirms that he will tell the truth, the whole truth and nothing but the truth. What is constitutionally protected in the right of a defendant to testify truthfully in his own behalf. An alibi is not one of several alternative defenses that can be simultaneously asserted. If what the statute terms an alibi is founded in truth and fact, the defendant was not present to commit the offense charged. If this is the situation, the defendant suffers no prejudice by the requirement of advance notice of intention to establish such fact. If we are discussing the right of a defendant to defer until the moment of his testifying the election between alternative and inconsistent alibis, we have left the concept of the trial as a search for truth far behind. Where this situation was presented to this court, we rejected the claimed right of a defendant to abandon the alibi of which he had given notice and substitute a new and different one at the time of trial. Where there is even a pretrial chance of alibi, this court has permitted cross-examination and introduction of the initial alibi notice as bearing upon an issue raised by the choice and change of mind of the defendant. These decisions, and the statute on which they are based, do not limit in any way the right of a defendant to testify truthfully in his own behalf. The condition of prior notice as to alibi testimony, like the test as to materiality and relevancy, does not invade the right of a defendant to testify in his defense."

State ex rel Simos v. Burke, supra, 41 Wis 2d at 136-38.

This assignment is without merit.

His final contention is that ORS 135.875 abridges his right to compulsory process to obtain witnesses in his own behalf. There was no such denial here. In *Simos* the Wisconsin court pointed out that the challenged statute does not disqualify any person as a prospective witness, nor does it purport to ban alibi evidence. It requires only the giving of reasonable notice of intention to do so and identification of prospective witnesses to be called in connection therewith.

In State ex rel Simos v. Burke, supra, the court well summarized:

> "From the standpoint of the constitutional rights of this defendant, we find no constitutional right infringed or invaded. From the standpoint of the public policy as determined by the legislature, we find a legitimate public interest served by the statute. From the standpoint of the reasonableness of the procedural requirement involved, we would conclude that establishing an earlier time than the trial itself for notice of alibi avoids mid-trial state motions for adjournment on the ground of surprise to permit investigation of alibi claims. The interest of the prosecution, defense and public are served by such facilitating of orderly, uninterrupted trials for the seeking of the truth and the protection of the rights of all concerned." 41 Wis 2d at 139-140.

We agree. The judgment is affirmed.

LETTER OF COURT OF APPEALS
Filed September 17, 1971

[Caption Omitted in Printing]

J. Marvin Kuhn
Deputy Public Defender
Labor & Industries Building
Salem 97310

Re: State v. Ronald Dale Wardius

Dear Mr. Kuhn:

I am directed to inform you that the court has today denied appellant's petition for rehearing in the above appeal.

Very truly yours,

/s/ JOSEPH A. GUIMOND
Deputy

JAG:bn
cc: John W. Osburn
Solicitor General
State Office Building
Salem 97310

LETTER OF SUPREME COURT—Filed November 16, 1971

[Caption Omitted in Printing]

Mr. J. Marvin Kuhn
Deputy Public Defender
Labor & Industries Building
Salem, Oregon

In Re: State of Oregon v. Wardius

Dear Mr. Kuhn:

I am directed to inform you that the Court has today denied petition for review in the above case.

Very truly yours,

/s/ JOSEPH A. GUIMOND

JAG:br
cc: Lee Johnson
Attorney General
John W. Osburn
Solicitor General
State Office Building
Salem, Oregon

SUPREME COURT OF THE UNITED STATES

No. 71-6042, October Term, 1971

RONALD DALE WARDIUS, PETITIONER

v.

OREGON

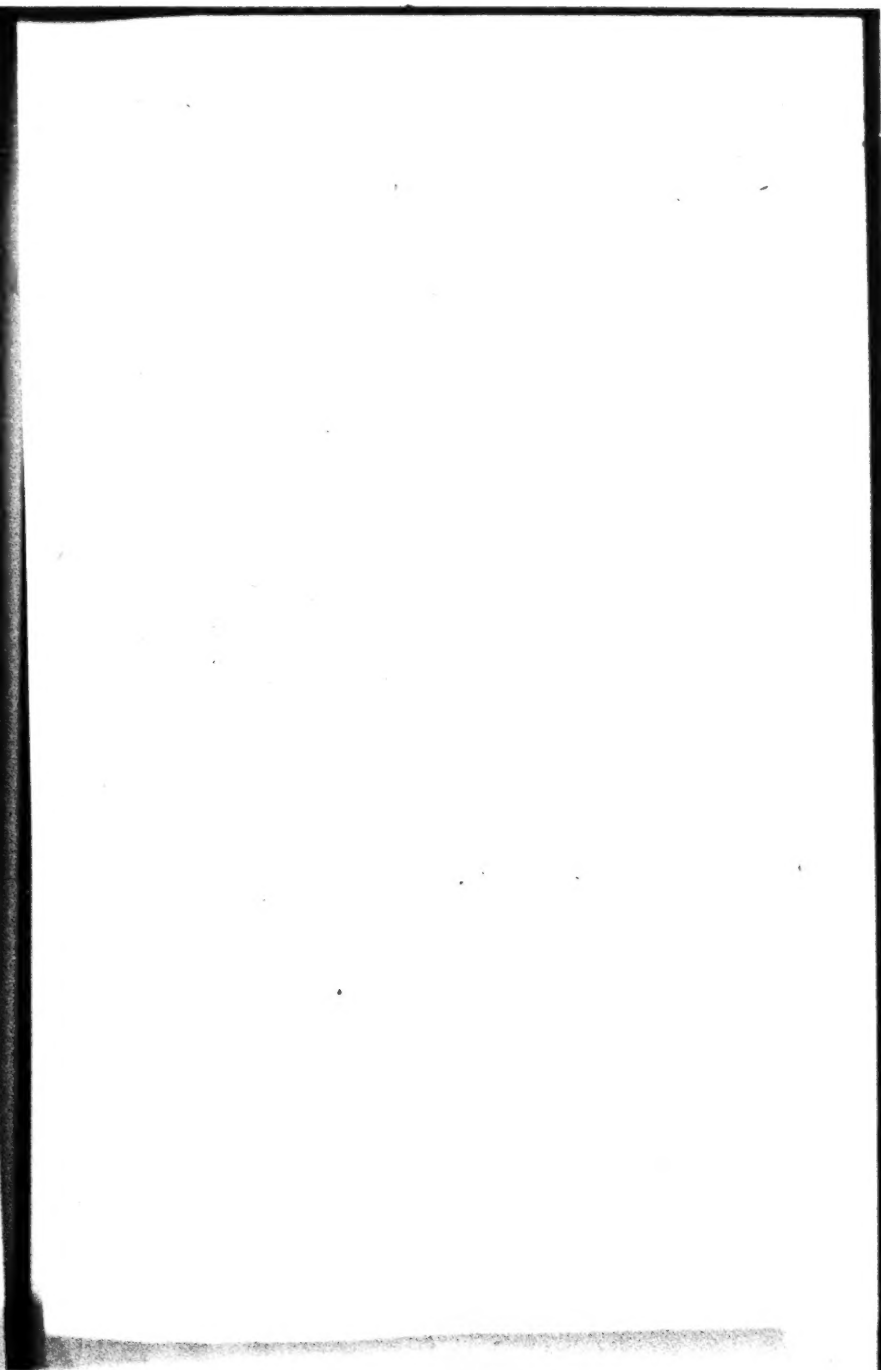
On petition for writ of Certiorari to the Court of Appeals of the State of Oregon.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

May 30, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

J. MARVIN KUHN
Deputy Public Defender
110 Labor & Industries Building
Salem, Oregon 97310

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IN THE

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OCTOBER TERM, 1972

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RONALD DALE WARDIUS,
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STATE OF OREGON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR PETITIONER

I. OPINION BELOW

The decision of the Court of Appeals of the State of Oregon in this case is reported at 93 Or Adv Sh 147, 487 P2d 1380 (1971), and appears in the printed appendix at page 18. There was no opinion in this case in the Supreme Court of Oregon. (See A.21).